# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1071

YELLOWSTONE PINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the Court of Claims erred in dismissing its complaint for failure to state a claim upon which relief could be granted.

On April 30, 1965, the Northern Pacific Railway Company, predecessor in interest to Burlington-Northern, Inc., sold petitioner the right to extract timber from its property until December 31, 1976 (Ct. Cl. Pet. 1-2, 4).[1] The property is surrounded by the Gallatin National Forest, a wilderness area owned by the United

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[1]"Ct. Cl. Pet." refers to the petition filed by petitioner before the Court of Claims containing petitioner's pleadings and allegations, which we are lodging with the Court.

States and administered by the United States Forest Service. Petitioner has requested the Forest Service to issue a Special Use Permit which would allow petitioner to construct a logging road across the National Forest (Ct. Cl. Pet. 2). While the Forest Service has not yet determined whether it will permit the construction of any logging road, it has so far rejected the particular routes and designs that petitioner has proposed (Ct. Cl. Pet. 8).

On April 2, 1974, petitioner commenced this suit in the Court of Claims, alleging that the failure of the Forest Service to act upon petitioner's request for a Special Use Permit comprised a taking of petitioner's property in violation of the Fifth Amendment, for which petitioner was entitled to $2,575,500 in damages (Ct. Cl. Pet. 8).[2]

The United States moved to dismiss the action on the ground that petitioner had failed to state a claim upon which relief could be granted. On November 15, 1974, the Court of Claims granted the motion and dismissed the complaint.

Petitioner's argument before the Court of Claims was premised upon an alleged right to construct a logging road through the National Forest. But this premise is supported by neither statutory authority nor judicial precedent. Congress has plenary power to govern the use of public land. *United States* v. *California*, 332 U.S. 19; *Utah Power & Light Company* v. *United States*, 243 U.S. 389. It has delegated its authority over the national

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[2]In addition to the United States, petitioner also named as defendants the Secretary of Agriculture and certain of his subordinates. In its response to the government's motion to dismiss, however, petitioner conceded that these individual defendants were not proper parties. The Court of Claims dismissed the petition as to these defendants, and petitioner does not now contest that portion of the order.

forests to the Secretary of Agriculture, 16 U.S.C. 551, who has discretion to deny or fail to act upon a request for a license to use national forest land for a private purpose, such as the construction of a logging road. Cf. *Texas Gulf, Inc.* v. *Federal Power Commission*, 494 F.2d 789 (C.A. 5); *Mosca* v. *United States*, 417 F.2d 1382 (Ct. Cl.), certiorari denied, 399 U.S. 911.

The statutes upon which petitioner relies for the first time in its petition before this Court[3] do not give it a right to construct a logging road through a national forest. Thus, 16 U.S.C. 478, which preserves the "egress or ingress of actual settlers residing within the boundaries of national forests," is inapplicable to petitioner, who is not a settler but a corporation seeking road access for the purpose of logging. Similarly, 16 U.S.C. 1134, which requires that the "owner" of private land surrounded by national forest "be given such rights as may be necessary to assure adequate access to such * * * privately owned land by such * * * owner," is also inapplicable to petitioner, which is a licensee rather than an owner.

In any event, petitioner has not been denied access to the timber land. As petitioner admitted in its petition before the Court of Claims, it may "log, either by aerial logging or horse logging" (Ct. Cl. Pet. 6) without the necessity of obtaining a Special Use Permit to construct

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[3]Since petitioner never raised these statutory contentions before the Court of Claims, this Court need not consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

a logging road through the National Forest.[4] Although petitioner asserts that neither aerial nor horse logging is economically feasible, petitioner is not entitled to a method of access which will make it *profitable* to extract the timber. To assert such a right is tantamount to insisting upon the right to build a railway through the National Forest should the logging road prove an uneconomical means of extracting the timber, or the right to dig a canal should a railway prove unprofitable.

Finally, the Forest Service has not in fact denied petitioner's request to construct the proposed logging road. It has merely rejected the particular routes and designs that petitioner has proposed, finding that the plans would pose an unacceptable risk of damage to the surrounding wilderness land. Certainly the Forest Service may condition its permission to construct a logging road through the National Forest upon a showing that the road as planned would not jeopardize the National Forest through which it is built.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

APRIL 1975.

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[4]Petitioner contends in its Petition for a Writ of Certiorari that the "announced policy of the United States Forest Service through an environmental Impact Statement is to * * * prevent logging of the private ownership land in * * * area[s] of Public Domain" (Pet. 2-3). The environmental impact statement to which petitioner refers, however, is merely a draft statement issued by the Forest Service on August 9, 1973, pursuant to the National Environmental Protection Act, 42 U.S.C. 4321-4335. Rather than announcing a policy against logging, the statement proposes that the "majority" of the land in the Gallatin Forest Area be preserved in a "roadless state," but that one road be reconstructed for use in "aerial logging" and that "short temporary roads" be permitted for the same purpose (Ct. Cl. Pet. 3).